NEEDED REFORMS IN CRIMINAL LAW AND PROCEDURE.

WILLIAM P. LAWLOR.[1]

The time has come when the constitution should express in precise terms every fundamental right involved in the administration of the criminal law, and declare that all rights not so declared shall be the subject of statutory control. The people should not be ruled by "dead hands." The common law should be tested by living principles of justice and abrogated by the supreme power of the state when it fails to advance those principles.

First of all it would be more in keeping with popular self-government if the constitution defined in precise and plain terms the scope of the provisions relating to jury trials. For instance, there is a growing opinion against the rule of the common law requiring a unanimous verdict in criminal cases. The subject has been recently discussed in this state in connection with certain proposed changes in the criminal law, and the preponderance of opinion favored a vote of nine to convict, except in capital verdicts, which, it is generally agreed, should be unanimous. Ought not the will of the people today be expressed on this question?

This provision is frequently quoted in support of appellate decisions reversing cases on the ground of the bias and prejudice of jurors. At common law the expression of an unqualified opinion by a person concerning the merits of a case constituted implied or legal bias, and because of that rule and this provision of the constitution the decisions have given an exceedingly narrow construction to statutes in derogation of the common law rule. This subject will be further touched upon when the statutes bearing on the bias and prejudice of jurors are considered. To obviate the effect of these decisions the constitution should expressly provide that the qualifications of jurors be prescribed by the legislature alone.

The constitution should provide that the people, equally with the accused, shall be entitled to a change of venue upon a proper statutory showing. The interests of justice demand that legal issues shall be determined in a forum where fairness and impartiality will be secured to both parties.

[1]Judge of the Superior Court of California.

The provision of the constitution that a person shall not be twice put in jeopardy for the same offense should be amended so that it will not apply to the case of a mistrial or a retrial of the action. The history of the rule of once in jeopardy is an apt illustration of the effect of the refinements of decisions upon the real purpose and scope of a fundamental right. Like nearly all rules of law affecting liberty, the rule of once in jeopardy was adopted to prevent the oppression of the individual. It is known that in the past when individual liberty was less secure subservient courts directed by a designing monarch at times subjected the individual to repeated trials, after he had been acquitted by a jury of his peers. Primarily, it was to prevent this form of oppression that the rule was adopted. It is doubtful if such a rule is really necessary now, for against such an abuse of individual right the enlightened public opinion of today would stand as a complete protection. But that is not the point of the suggestion: It is the law of decisions, for instance, that if a person is charged with murder, convicted of manslaughter and a new trial ordered upon his application, he cannot again be tried for murder upon that charge. This is upon the theory that the jury, by bringing in a verdict of manslaughter, in legal effect acquitted him of murder.

It is a part of common knowledge that the deliberations of a jury are dominated by a spirit of compromise. It is generally this spirit, rather than a formal determination on the merits of the charge, that is responsible for the verdict rendered. It is certainly safe to assume that the people who voted to put this provision in the constitution never intended to extend it to a mistrial or a retrial of the action.

The constitution provides that no person shall be compelled to be a witness against himself in any criminal case. The idea that the state shall not compel the accused to convict himself out of his own mouth finds general favor with the American people. The provision of the constitution is founded on the rule at common law. But before it first became the law a defendant in a criminal case was not a competent witness in his own behalf. It was recognized, of course, that it would be unjust to compel him to be a witness for the government when he could not testify for himself. Under the statutory law of this state, however, he is a competent witness in his own behalf.

By section 1323 of the penal code of California, if a defendant in a criminal case testifies, he may be cross-examined by the people as to all matters about which he is examined in chief. By virtue of the

provisions of the constitution and section 1323 the limits of cross-examination are closely drawn in the appellate decisions, and many cases have been reversed because of the claim that a fundamental right of the defendant had been infringed by improper cross-examination. It is reasoned in those decisions that to the extent the cross-examination exceeds the limits of his direct examination he is made a witness against himself within the meaning of the constitution.

It is further held that unless the defendant by the range of his direct examination touches on matters affecting his credibility as a witness, the people are not permitted to make such an inquiry, except as to previous conviction of felony. Hence, a defendant may, by the exercise of this right, exclude from the consideration of the jury all information concerning his antecedents, habits of life, occupation, source of his support, his domestic and other relations and previous criminality, unless, as already stated, it reaches the grade of a felony. The enforcement of this rule sometimes presents situations which are disturbing to a proper sense of justice. The experience of mankind has demonstrated the efficacy of a proper inquiry concerning the credibility of a witness in order to ascertain the truth, but in the case of a defendant it must, except as to a prior conviction of felony, be entirely ignored unless he, by the range of his direct examination, renders the inquiry pertinent and proper cross-examination.

The other witnesses whose testimony is to be weighed against that of the defendant may be fully examined on all matters going to their credibility. Why should the jury be denied the knowledge concerning the kind of a man the defendant is when he appears as a witness? To hold otherwise is to eliminate an important test in the ascertainment of the truth. So long as the defendant cannot be made a witness against himself, and may appear in his own behalf, he should be treated the same as any other witness in matters of credibility. In my judgment this is the real meaning of the sections quoted. The constitution should be amended so that in matters of credibility all witnesses shall be placed upon the same footing.

The experience of courts proves that the provision of the constitution relating to compulsion should in no case apply to testimony given before a grand jury, for its application tends to defeat lawful investigation. The constitution should be so amended and further provide that if a witness is indicted after he has given testimony before the grand jury it should not thereafter be used

against him, except on a charge of perjury arising from such testimony.

The constitution provides that judges shall not charge juries as to matters of fact, but may state the testimony and declare the law. If this provision is to remain, then, it should be amended in order that the inhibition on the power of judges should only apply to the practice of judges at common law of advising with the jury on matters of fact. In my own opinion the administration of the criminal law would be more effective if the rule were entirely abolished. In stating the testimony, which is within its province, the court should be allowed to point out its relevancy, but in every case the court should be required to instruct the jury that they alone are the final judges of the facts. The provision, as it now stands, has been given a very narrow construction in the appellate decisions. The tendency of these decisions is to render judges timid in making any reference to the evidence during the trial, even for the purpose of illustrating propositions of law. This restriction on the prerogative of the court militates against an effective administration of the law. The people never intended that their ministers of justice should be hampered in the discharge of their proper duties. In my judgment the provision simply means that judges shall not attempt to control the jury in resolving the evidence into facts. It certainly was not intended to impair the proper effectiveness of the court.

One of the most serious defects in the present system is the lack of sufficient power in the trial court and the too liberal exercise of authority by the appellate courts in criminal cases. The constitution should enlarge the authority of the one and restrict that of the other. The change should be so clearly expressed that there could be no question of the authority of either. The result can be reached by having the constitution enumerate *ex industria* the only questions that may be raised on appeal. All other matters would then become final in the trial court, with the result that greater expedition would be shown in the disposition of criminal charges. The suggested change is based upon experience and the inherent difference between the exercise of original and appellate jurisdiction. The difference is fundamental.

The trial court, which deals directly with human beings—litigants, witnesses and counsel, should have sufficient authority to enable it to deal with them effectively. In order to serve the interests of justice in the highest sense the power of the trial court should be broad and commanding and all should be com-

pelled to respect its authority. This consummation is found difficult under the law as it now stands, because it permits the authority to be challenged at every turn and exceptions noted to every act and word of the court which does not meet with the approval of the accused and his counsel. The court is practically the issue. This tends to weaken its authority. The incessant noting of exceptions to the action of the court is sometimes availed of for the sole purpose of defeating the proper effectiveness of the judge with the jury in the case at hand. Such a result is deplorable in the extreme. And on appeal it would seem as if the trial court and the district attorney were on trial, instead of it being simply a hearing to settle the questions of law involved.

If the constitution shall prescribe the only questions that may be presented on appeal the trial court would then have a definite conception of its authority and could control the proceedings accordingly. This proposed change would find support in the reflection that exceptions involve matters of fact in greater or less degree, while the constitution provides that appellate jurisdiction in criminal cases shall be confined to questions of law alone. The principal weakness is found in the practice of considering on appeal practically every question that is raised up to the point of taking the appeal. This reduces the final authority of the trial courts to a minimum, involves voluminous records on appeal, and in consequence, the rights of the public are made to suffer, the law to become weak, and the activities of the malefactor to go unchecked. The verdict of the jury and the judgment of the trial court only mark the preliminary skirmish of the litigation. Causes are frequently reversed on points which were not raised in the trial court, and no effort is made to ascertain before deciding the appeal the views of the trial judge in regard to them. Such a practice is opposed to every rule of order and common sense. Reversals in the great majority of cases entail a defeat of justice. This, in turn, tends to render the people dissatisfied with the law and the courts and to encourage the malefactor to break the law.

It is to be borne in mind always that the administration of the criminal law requires the participation and co-operation of the citizen. With the court he shares the duties and responsibilities in the enforcement of the law. This is the genius of the American system of criminal justice. By the system it is intended that the people themselves, through the medium of the jury box shall perform an important and responsible part in the administration of

the law. It would seem to follow necessarily that if the people are generally dissatisfied with the administration of the law, then to that extent government fails. For the people are deemed to be governed by their own consent. Every case of a criminal escaping merited punishment tends to render the people discontented and criminality to flourish. The people should insist on a rigid enforcement of the law at the hands of their public servants. It will be recognized that while the commission of murder is a crime against the peace and dignity of the entire state, yet the community in which the offense is committed naturally is more directly concerned in having the murderer punished for life is thus made less secure in that locality. The people should be encouraged in every way to take an active interest in the selection of public officials, the execution of the laws and the administration of justice. The right of trial by jury in France followed the Revolution. The citizen of that country exercised this right ardently and faithfully. Every citizen of this republic ought to appreciate the honor of being selected under solemn process to sit on the trial of the rights of his fellowman.

Under our system the accused is presumed to be innocent of the offense charged, which presumption serves as a shield until guilt is established beyond a reasonable doubt. Under this rule and the human interest which is inherent in questions of life and liberty, the determination of the question of the guilt or innocence of a defendant involves a serious task. This is at it should be. The responsibility of clearly showing guilt before punishment is pronounced should be as heavy as the liberty of the individual is dear. The protection of the innocent is the prime aim of the criminal law, and it is the first duty of the courts of the land to protect the innocent. It is necessary to the protection of the innocent, however, that the guilty shall be punished. The ascertainment of guilt should be practicable. The machinery of the law should be so made and operated that proof of guilt may be shown in accordance with reason and justice.

When guilt is brought home to the accused by a court and jury it is but reasonable for the people to insist that there shall be no interference with the judgment of punishment, except upon considerations of the gravest character. The accused has had his day in court. He has been attended at every turn by the presumption of innocence. The doctrine of reasonable doubt has been urged throughout the trial. His day in court does not mean two days

or three days, as might be assumed from the procedure on appeal. And the judgment of a court of record, based on the verdict of a jury, should not be disturbed on appeal unless it can be clearly shown that the defendant has not had his day in court, according to the substance of the law of the land.

It has been pointed out that appellate jurisdiction in criminal cases is limited to questions of law alone. It was never intended that the appellate courts should pass upon the merits of the charge, or that they should exercise a general revisory authority over the action of the trial court and the jury. Both the trial court and the jury are responsible to the law. The appellate courts are only concerned with the determination of the questions of law reserved for appeal. This is the limit of their power and responsibility. The plain meaning of the constitution and the statutes in respect to appellate jurisdiction in criminal cases is that the appellate courts shall decide the legal questions presented by the record, and to affirm the judgment unless the affirmance would work a miscarriage of justice.

It is the view of many great jurists and thinkers that a judicious exercise of appellate authority serves to crystalize the law in its purity and to maintain the integrity of human rights. Decisions should be firmly rendered without regard to the fortunes of any particular cause. But no case should ever be reversed because of a departure from any rule unless it is found that an affirmance would work a miscarriage of justice. Such a doctrine will find unqualified support among the people themselves for whose benefit laws are made. The accused should be required to bear his burden on appeal as fully as the people have borne the burden of proof up to the establishment of guilt. All intendments and presumptions should be in favor of the judgment of conviction. The rule of decision that if error is shown injury will be presumed in my view is repugnant to every theory of criminal law under our system.

The rule of appeal in criminal cases is laid down in section 1258 of the Penal Code of California, which provides:

"After hearing the appeal the court must give the judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. On appeal all presumptions and intendments are at all stages in favor of the regularity of the action of the trial court.

The following amendment to that section was proposed in the last legislature, but it failed of passage:

"No judgment, order, decision or decree shall be reversed, nor a new trial ordered, by reason of any error, ruling, instruction, or defect in the proceedings, unless it appears from the record on appeal, that by reason of the error, ruling,

instruction or defect complained of, the party has suffered substantial injury. There shall be no presumption that error is prejudical, or that injury was done if error is shown. And unless it is the opinion of the court that by reason of such error, ruling, instruction or defect the affirmance of the judgment would produce a miscarriage of justice, the judgment must be affirmed."

If this were made the rule of decision and it was faithfully followed, there would be less fault to find with the administration of the criminal law. Without regard to the rule of decision on appeal, the trial court should nevertheless carefully follow the spirit and letter of the fundamental and statutory law in the exercise of original jurisdiction. It should be careful to avoid any departure from the law and always be prepared to afford proper relief if it appears that the defendant has been prejudiced thereby.

Great delays result from dilatory pleas, or those proceedings that take place between the filing of the charge and the trial of the general issue. The defendant on arraignment may first move to set aside the indictment or information. Under this proceeding all matters relating to the formation of the grand jury and the state of mind of the grand jurors may be inquired into. I do not think that either inquiry should be allowed. The formation of the grand jury should take place in open court, and notice thereof given to the public. If any objection is interposed at the time it should be decided on its merits. If no objection is interposed at the time, none should thereafter be heard. When the grand jury is formed the court should make a finding that it has been formed according to law. This should be conclusive in all subsequent proceedings. Under the existing law if it is found that one of the grand jurors who participated in the finding of the indictment was in a state of mind which would render him disqualified to act as a trial juror, the indictment must be set aside. This should not be the law. The substitute for this rule should consist either of an enlargement of the oath taken by the grand jurors when the grand jury is formed so as to require a voluntary avowal of an affected state of mind in any particular matter, or requiring that each grand juror should take an oath before hearing any particular matter that he is not through information, knowledge, leaning or connection, or otherwise, disqualified to act therein.

To hold that a grand juror be as qualified to act on an indictment as a trial juror should be to sit on the trial of the general issue, is carrying the rule to extremes. Apart from indictments any individual can file a charge against another before a magistrate without the sanction of an oath of office or on anything other than his personal responsibility. The individual may

be punished for false imprisonment or made to pay damages, but, nevertheless, upon his formal complaint the law may be put in motion. The action of a grand jury composed of citizens chosen in the first instance by the court and organized under solemn judicial process, and specially invested with powers of a judicial nature, should be sufficient to place the accused upon trial before his country, if the law in other respects is observed.

If the motion to set aside is disallowed, the accused may then demur to the pleading. If the pleading is lacking in any essential the court should allow the district attorney to amend it in the same way that pleadings are amended in civil cases. The rule should not require the filing of a new indictment or information. There are two essentials and they should be covered in the pleading: The defendant should be aptly apprised of the facts of the charge he is to meet, and they should be alleged with such precision that identity would be shown in the pleadings if he should thereafter be charged with the same offense.

There should be no challenge allowed to a regular panel or a special venire of trial jurors. Upon the return of the sheriff the court should make a finding that the regular or special panel has been lawfully formed, such finding to be conclusive in all subsequent proceedings. The withdrawal of the challenge to trial jury panels will tend to prevent delay. Moreover, the panel is an incident to the securing of a jury. The personnel of the jurors is the essential involved. On their *voir dire* the jurors are subjected to a close examination as to their general, as well as their particular qualifications. If the juror is not qualified he may be challenged for cause. In every instance, however, the trial court should exact a scrupulous enforcement of the law in drawing and summoning jurors.

In criminal cases generally, and especially those involving unusual publicity, a great deal of time is consumed in the selection of the trial jury. Much of the delay is caused by the state of the law regarding the qualifications of jurors. But this is not the only cause of the delay. The counsel frequently use the time of the court in an attempt to disqualify a juror for reasons other than legal cause. The effort is not always made to secure a fair and intelligent juror, but rather one who will meet the needs of the defendant's situation. This is one of the greatest abuses in the criminal law.

An amendment was proposed in the last legislature of California to require the court to conduct all examinations of jurors touch-

ing their qualifications, and upon the trial of challenges for cause, with such assistance from counsel for the parties as the court in its discretion may permit. It was also proposed in the last legislature to compensate for this change by increasing the number of peremptory challenges, but both measures failed of adoption. At present the people are only entitled to one-half the number of peremptory challenges as the defense. This discrimination against the people is not supported by any good reason. It was proposed to give the parties the same number—twenty-four in capital cases and twelve in all other felonies. In the interest of justice, for the convenience of the citizen and to lessen the public expense, this change should be made.

Under the common law a person was disqualified from serving as a trial juror if he had formed or expressed an unqualified opinion on the subject-matter of the controversy. This constituted implied or legal bias—that is to say, when the fact that the unqualified opinion had been formed was proved, the person, as a matter of law, became disqualified. It would be immaterial what the actual state of mind of the individual toward the case at the time might be, or the extent to which he could control his will power. But as time went on it was found impossible to adhere to this rule. The development of the art of printing, publicity by newspapers and other means of spreading information, the new and extending forms of communication by means of the railroads and other agencies of modern life, tended to the enlightenment of the individual, and he formed and expressed opinions accordingly. And the more enlightened the individual became the more he formed opinions on matters of public concern.

In 1873-74 the legislature of California changed the law. What was formerly implied or legal bias was made actual bias. This amendment was supplemented by another, that no person should be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to the jury founded on public rumor, statements in public journals, or common notoriety, provided it appear that he can and will, notwithstanding such opinion, act fairly and impartially on the issues to be tried.

It was doubtless one of the aims of those responsible for this change to render eligible for jury service persons who, because of their intelligence, were found disqualified to sit in a case which attracted great public attention. But that such is the result of the change will not be claimed by anyone having any knowledge on

the subject. The more a person informs himself the less likely he is to come up to the measure of a qualified juror. Hence it is found difficult to have persons who keep abreast of the times and who are informed on matters of general interest qualify as jurors. This is chiefly due to the appellate decisions on the subject. It is held that because the amendments are in derogation of the rule at common law by virtue of the provision of the constitution relating to trial by jury, they must be strictly construed.

It is the law of decision that when it appears that the person has formed or expressed an opinion going to the merits of the matter it must affirmatively be shown that such opinion is founded upon public rumor, statements in public journals, or common notoriety, or the person will be held disqualified. This rule presents great difficulty. It is not always practicable to establish the source of the opinion. If this cannot be done affirmatively by the people the person is not qualified to serve, however capable he may appear to the court passing on the question. In cases which attract widespread attention the difficulties presented by the rule of these decisions are almost insurmountable. The enforcement of the rule tends to paralyze the law.

In my opinion no person who has formed or expressed an opinion upon the matter or cause to be submitted to the jury should be held disqualified if it appear that he can and will act fairly and impartially, provided such opinion is not founded upon a personal knowledge of facts material to the issue, or upon statements made in the presence and hearing of the challenged person by one having or claiming to have, such personal knowledge.

Instructions to juries in criminal cases should be prepared by the judge alone, with such assistance from the counsel as he in his discretion may permit. The right should be reserved to the parties to present to the judge in writing a specification of the points of law on which they desire the jury to be instructed. Upon such request the judge should be permitted to require the parties to formulate an instruction covering the specification. But no judgment should be reversed for failure of the judge to instruct as to any point omitted in such specification. The present law on the subject of instructions to juries furnishes occasion for the grossest forms of abuse of judicial process.

Advantage is frequently taken by counsel for the accused to propose instructions to the jury clearly for the purpose of laying a trap for the court to drop into error, and to have an argument

issue from the lips of the judge in favor of the defendant and against the people. In a case tried in San Francisco some time since nearly two hundred elaborated instructions were proposed, containing in the neighborhood of 35,000 words. It is not difficult, therefore, to understand why instructions shrewdly presented in every conceivable form on the same subject shall, in the present rule on appeal, furnish grounds for reversal. There is hardly any phase of a jury trial which impresses the jurors less than the instructions from the court when they come in so many forms and at such length. A multiplicity of instructions tends to confuse rather than enlighten the jurors, and in the interests of justice this abuse of judicial process should be corrected. The law pertinent to the case should be stated to the jury plainly and without repetition.

Under the law as it now stands persons jointly accused may, as a matter of right, demand severance from each other in the trial of the general issue. With the present complicated machinery of the law, the exercise of this right by the defendants in cases that call for protracted trials, leads at times to a practical blocking of the wheels of justice. Persons jointly accused should, in the discretion of the court, be separately or jointly tried. It is an impeachment of the efficacy of the jury system to provide for severance upon the theory that the jury will not discriminate between defendants upon whom guilt bears and those against whom there is not sufficient evidence to warrant conviction.

There should be a statutory definition of the presumption of innocence, moral certainty and the doctrine of reasonable doubt, and none other on these subjects should ever be given to the jury. The doctrine of reasonable doubt should attach only to the trial of the general issue. In all other matters the people should only be required to establish a fact by a preponderance of the evidence, and it should be plainly provided that a defendant must establish any fact, the burden of which is cast upon him by the law, by the same degree of proof. The absence of a definite rule in these matters of proof gives rise to uncertainty in the law and occasions anxiety in the mind of the trial judge when such questions are raised. The rule found in the decisions that the presumption of innocence is the only presumption in a criminal case should be modified. The disputable presumptions enumerated in the statute reflect the experience of mankind and they should serve as evidence for either side unless controverted. It is not always clear that the rule of evi-

dence which requires a party having peculiar knowledge of a fact to assume the burden should be followed in a criminal case. The burden of proof to establish the charge should, however, always rest on the people in a criminal case, and the jury should be convinced beyond a reasonable doubt before finding guilt.

The statute of limitations should be amended so that the time when the alleged criminal act is being prosecuted in any form should not be reckoned against the people. It sometimes happens that the alleged criminal act is charged under the wrong form of offense, but so long as the people are diligent in the effort to bring a defendant to justice this statute ought not to run in his favor. The people should not be penalized by reason of the errors of judgment of officers, nor should the time run in favor of a defendant when absent from or hiding in the state.

The provision of law under which the judge may be disqualified on the ground of bias or prejudice should be abolished. It is seen in practice that advantage is taken of this law to render judicial proceedings ineffective, without regard to the real mental attitude of the judge toward the party urging the disqualification. The provision serves to scandalize judicial proceedings and to break down the respect which the people should have for the courts. The practice of putting judges on trial tends to weaken the proper effectiveness of courts. It is a direct menace to the orderly administration of the law of the land.

The law relating to accomplices should be repealed. Under our system the jury exercises full authority in matters of fact. The system contemplates a reliance on the jury to competently deal with all problems of evidence. The jury should be left to decide, without any special rule of law to govern them, whether the testimony of the accomplice is sufficient to establish conviction beyond a reasonable doubt. The rule of corroboration has frequently defeated the vindication of the law. Under it perpetrators of the gravest crimes act with a sense of security. The rule places a premium on deep criminality. Crimes that directly tend to undermine the government have become alarmingly prevalent. Bribery is a common form of offense and is one of the most difficult to establish. It strikes at the due exercise of the powers of government. There are too many fine spun distinctions found in the decisions dealing with this rule. Our judicial system proceeds on the theory that the jury can best determine questions of fact. In cases where accomplices testify the jury either believes or dis-

believes their testimony and the verdict is determined accordingly. The purpose to be served by the legal rule would be realized in the individual judgment of the jurors, for they as men know that great care should be exercised in such cases. But if they are convinced beyond a reasonable doubt by the testimony of the accomplice this should be sufficient as a matter of law on the question of guilt. Is it not safe to assume that there would be less bribery if either of the parties to the transaction could be convicted on the testimony of the other? Violators of the law who act with or through accomplices will have less confidence in their ability to escape punishment if this rule is abolished.

The testimony of a witness in a former trial of an indictment or information should be read to the jury on behalf of the people on a retrial, when the witness is dead or insane, or cannot, after the exercise of due diligence, be found within the state. As the law now stands, such evidence is available to a defendant only. This discrimination against the people frequently results in the disposition of criminal causes other than on their merits. Justice will not be reconciled to such failures of the law because of any right of the accused. Under the common law he was entitled to be confronted with and cross-examined the witnesses against him, but this right is conserved by the opportunity which the former trial affords him to cross-examine the witness.

The law should prescribe the proper occasion for the use of affidavits in criminal actions or proceedings. It should be the rule that, except on the trial of the general issue, any showing of fact proper to be made before any court or judge upon any motion, or other proceeding, shall, when not otherwise expressly provided for, be presented in the form of affidavits, unless the court or judge in the exercise of a sound discretion shall order that *oral* testimony be taken. The averments of such affidavits should conform to the rules of evidence applicable to oral testimony, and all incompetent averments should be disregarded by the court or judge in the determination of such evidence. This amendment would eliminate many elements of uncertainty in the present practice and tend to the expedition of judicial business.

The law should be amended so that the sufficiency of the evidence taken before the committing magistrate should not be tested by *habeas corpus*. After a defendant is held by a committing magistrate a trial jury should determine all questions of evidence. If the criminal procedure is reformed the hearing would be expedi-

tiously held. It is not a safe procedure to have questions of evidence determined upon a transcript of the bare testimony. The general policy of having questions of evidence decided by a jury on a trial of the merits of the charge and after hearing the witnesses should be followed as uniformly as possible. It is a departure from the genius of our criminal law system to attempt to decide questions of fact in any other way, especially where they go to the merits of the charge. On the trial of the general issue the jury is not bound by the advice of the court upon matters of evidence. After verdict the trial court may review the evidence as to its sufficiency and this will furnish judicial relief for the defendant if the verdict is not sustained by the evidence.

The law should be changed so that a witness may be impeached if he has committed any form of statutory crime. As the law now stands the impeachment is limited to a prior conviction of felony. This rule leads to strange experiences. For instance, a defendant may be an unregenerate petty larceny thief, go upon the witness stand, and the fact of his thievish propensities ignored.

There should be a modification of the law covering exemptions from jury service. The exempted classes should be limited to clergymen, doctors, druggists and lawyers. Under the present law a large class of citizens escape this duty. The holder of stock in a corporation, or any other form of interest in property, whether standing in his own name, or that of his wife, or otherwise, should render the individual a qualified juror, so far as the property qualification is concerned.

A law should be passed making it a crime for any newspaper for hire to attempt to corrupt public opinion. The right to freely speak, write and publish his sentiments on all subjects is one of the dearest rights of the citizen, but every citizen should be held responsible for the abuse of the right. The liberty of the press should be preserved. The honest newspaper stands as a guarantee against any form of oppression of the individual. In a practical working sense it is a part of our institutions. The reporter of an honest newspaper who enters a court of justice to report the proceedings is a shield against judicial oppression, because he appeals directly to public opinion. The newspaper of today, when honestly conducted, is a safeguard to human liberty, and by its activities obviates, in my judgment, many of the rules of the past which are so slavishly followed in the forms of law. It is the dread of every rascal in public life. But a newspaper should not be permitted to

corrupt public opinion. We have laws dealing with morals, sanitation, pure food and other subjects affecting the moral and physical health of the state. The public should likewise be protected against newspapers which undertake to corrupt public opinion for hire. If this form of degrading enterprise is to be tolerated neither the government nor the individual is safe. The former depends upon an enlightened public opinion for the realization of its high objects. The latter is as much entitled to his peace of mind as he is to his life, and law should protect him accordingly.